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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSE MEDARDO ALVERO CRUZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF *AMICUS CURIAE*, TAX SECTION OF THE FLORIDA BAR, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Question Presented for Review

Whether the Eleventh Circuit's new definition of accrual of tax liability which imposes additional requirements beyond the recognized principles of accrual accounting conflicts with pronouncements of this Court and other federal courts, and redefines the concept of accrual for income tax and other purposes in a manner having implications far beyond this case?

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Statement of Interest of *Amicus Curiae*, Tax Section of the Florida Bar

The Florida Bar is a non-profit association organized under the laws of the State of Florida and composed of members in good standing of the Bar of the State of Florida. The Florida Bar is dedicated to the inculcation in its members of the principles of duty and service to the public, the improvement of the administration of justice,

and the advancement of the science of jurisprudence. Among its many activities is the analysis of legislation and judicial decisions that affect its members and the society they serve.

The Tax Section of The Florida Bar is charged with the responsibility of focusing upon issues of state and federal tax law. In connection with such responsibility, the Tax Section analyzes existing and proposed tax legislation and judicial decisions construing the tax laws. Through its Tax Section, The Florida Bar provides a forum for debate and for the interchange of ideas on issues of relevance to its members and to society.

The Tax Section of The Florida Bar is vitally concerned with judicial construction of the tax laws such that the intent of the subject law is effectuated. The Tax Section of The Florida Bar is also concerned with the uniform construction and application of the tax laws. Finally, The Tax Section of The Florida Bar is concerned that precedent be followed in the application of the tax laws such that the goals of uniform construction and equal treatment can be attained.

Accordingly, The Tax Section of The Florida Bar has a vital interest in seeking review of the decision of the Eleventh Circut Court of Appeals, which if left undisturbed would authorize, in the Eleventh Circuit, a heretofore unrecognized definition of the word "accrual" which is in conflict with the legislative intent behind the foreign tax credit of the Internal Revenue Code as well as with the definition of the word "accrual" as set forth in the regulations of the Treasury Department, by this Court, and followed by circuit courts and lower federal courts. The definition of the word "accrual", as set forth by the Eleventh Circuit, frustrates the intent of Congress and undermines the uniform application of the tax laws.

Consent to the filing of this *amicus curiae* brief has been granted by both petitioner and respondent.

Summary of Argument

Succinctly stated, this case raises the issue of a court's power to subvert the intent and plain language of a tax statute by "redefining" its terms in a manner which is inconsistent with the legislative definition and with a long-settled judicial definition.

Although this case arises out of an allegedly erroneous jury instruction in a criminal tax prosecution dealing with the application of the foreign tax credit, the decision of the Eleventh Circuit, and its "redefinition" of the term "accrual", will have serious and far reaching ramifications outside of the area of criminal tax law and outside of the area of the application of the foreign tax credit.

The Eleventh Circuit's decision defining the word "accrual" squarely conflicts with the definition of that term set forth in the regulations of the Treasury Department, decisions of this Court, decisions of federal circuit courts and decisions of many lower federal courts. In addition, the decision of the Eleventh Circuit undermines the purpose behind, and the effect of, the foreign tax credit—the prevention of double taxation. By defining "accrual" of a foreign tax, for purposes of the foreign tax credit, as occurring upon levy and assessment, the United States may now tax foreign-derived income even though a foreign tax on that income has "accrued." It is unclear whether or not the Eleventh Circuit's definition is limited to the context of a foreign tax credit in a criminal prosecution for tax evasion, or whether that definition applies generally. It is unthinkable that the term "accrual" can have a different meaning in different contexts. If it did, a taxpayer could be criminally liable for an activity to which no civil liability attaches. In addition, if the Eleventh Circuit's decision is allowed to stand, taxpayers in that

Circuit will labor under a rule which is an anomaly. These taxpayers will receive treatment different from taxpayers in other areas of the country under a federal law which is necessarily uniform. This will cause large-scale problems of basic business accounting.

The decision of the Eleventh Circuit violates precedent, is inconsistent with the clear meaning of federal regulations, undermines the policy behind the foreign tax credit, as well as the application of federal laws which should be uniform. As such, the Eleventh Circuit's decision below has implications far beyond the confines of the case.

ARGUMENT

The Eleventh Circuit's new definition of the term "accrual" conflicts with the definition of that term set forth in the Regulations of the Treasury Department, in decisions of this Court, as well as in decisions of circuit courts and lower federal courts. If left undisturbed, such definition will undermine the purpose behind the foreign tax credit and destroy the uniformity necessary for the effectuation and application of the tax laws.

The settled definition of the word "accrual" recognizes that "accrual" takes place when all of the events have occurred which are necessary to determine the fact of liability and which fix with reasonable certainty the amount of such liability. It has long been the settled law as to both foreign and domestic tax credits, as well as to deductions, that "accrual" may occur in advance of levy and assessment. In *United States* v. *Cruz*, 698 F. 2d 1148, at 1151 (11th Cir. 1983), the Eleventh Circuit altered this definition by holding that a foreign tax does not "accrue" until the foreign government levies upon the taxpayer.

Section 33(a) and Section 901(b)(3) of the Internal Revenue Code provide that taxes due to the United States may be offset by any foreign tax for which the taxpayer is liable, regardless of whether or not the foreign tax has been paid. 26 U.S.C. §33(a); 26 U.S.C. §901(b)(3). Section 901(b)(3) of the Internal Revenue Code defines the amount of the foreign tax credit as "the amount of any such taxes paid or accrued during the taxable year to any foreign couuntry". 26 U.S.C. §901(b)(3). Section 905(a) of the Internal Revenue Code allows the taxpayer to take the foreign tax credit in the year in which the foreign tax "accrues". 26 U.S.C. §905(a). Section 905(c) of the Internal Revenue Code permits the redetermination of the taxpayer's United States tax liability if the amount of the foreign tax paid differs from the amount claimed as a credit by the taxpayer as an accrued foreign tax liability. 26 U.S.C. §905(c).

Because resident aliens are taxed by the United States on income earned worldwide, they are exposed to international double taxation if their foreign income is also taxed by the country from which it is derived. To alleviate this problem, 26 U.S.C. §901 authorizes an elective credit for foreign income taxes. Rev. Rul. 58-55, 1958-1 C.B. 266; B. Bitker, 3 *Federal Taxation of Income, Estates and Gifts,* at ¶69.1.1. The theory behind the foreign tax credit was summarized by the Internal Revenue Service in Rev. Rul. 58-55, 1958-1 C.B. 266, at 267:

> The basic purpose of the allowance of a foreign tax credit is to provide a credit against United States income on specific income from foreign sources for foreign taxes paid on such income and in this manner to substantially avoid double taxation on the income when earned. See H.R. Report No. 767, 65th Congress, Second Session, C.B. 1939-1 (Part 2), 86, at page 93. The alternative pro-

> visions of section 905(a) of the 1954 Code allowing a credit for foreign taxes when the tax accrued, irrespective of the accounting method used, demonstrate the special nature of such credit. The purpose of this provision of the Code was to allow a taxpayer, employing the cash method of accounting, to take the credit in the year in which the foreign tax accrued and thus offset the foreign tax against United States Federal income tax due. See H.R. Report No. 179, 68th Congress, First Session, C.B. 1939-1 (Part 2), 241, at page 257, and Senate Report No. 398, 68th Congress, First Session, C.B. 1939-1 (Part 2), 266, at page 284.

The Senate Finance Committee explained the rationale as follows:

> [The] foreign tax credit system embodies the principle that the country in which a business activity is conducted (or in which any income is earned) has the first right to tax the income arising from activities of that country, even though the activities are conducted by corporations or individuals resident in other countries. Under this priniciple, the home country of the individual or corporation has a residual right to tax income arising from these activities, but recognizes the obligation to insure that double taxation does not result. Some countries avoid double taxation by exempting foreign source income from tax altogether. For U.S. taxpayers, however, the foreign tax credit system, providing a dollar-for-dollar credit against U.S. tax liability for income taxes paid to a foreign country, is the mechanism by which the double taxation is avoided.

S. Rep. No. 94-938, *reprinted* in 1976-3 C.B. (Vol. 3), at 271.

To accomodate its tax system with that of other countries, the United States has chosen the foreign tax credit as the method of preventing double taxation. See Ad Hoc Committee on Foreign Tax Credit, Section of Taxation, American Bar Association, *Comments Regarding Proposed Foreign Tax Credit Regulations,* 33 Tax Lawyer 35, at 36 (1979). It has been stated that "[a]s our system stands, it is this foreign tax credit device which makes United States trade and investment abroad possible in the twentieth century tax world—a world in which income taxes at high rates are the central theme." S. Surrey, Preface to E. Owens, *The Foreign Tax Credit,* at vii (Harvard Law School 1961), *cited in,* Ad Hoc Committee on Foreign Tax Credit, Section of Taxation, American Bar Association, *Comments Regarding Proposed Foreign Tax Credit Regulations,* 33 Tax Lawyer 35, at 36 (1979). The objective of the credit is to eliminate the imposition of income tax both by another country and by the United States on income from foreign sources. The Internal Revenue Code accomplishes this by "yielding to the foreign taxing jurisdiction, not by exemption of foreign source income, but by a credit of the foreign income tax as long as there is foreign source income". Ad Hoc Committee on Foreign Tax Credit, 33 Tax Lawyer, at 37. This policy "is frustrated to the extent that taxes imposed by a foreign country and the United States under similar tax systems are not offset by a U.S. credit". Ad Hoc Committee on Foreign Tax Credit, 33 Tax Lawyer, at 37.

Although the legislative intent behind the foreign tax credit, as set forth in S. Rep. No. 94-938, quoted above and *reprinted in* 1976-3 C.B. (Vol. 3), at 271, is clear, in its decision below, the Eleventh Circuit has ignored the legislative mandate and has substantially increased the possibility of double taxation even though a foreign tax on that income has previously "accrued".

By altering the definition of the word "accrual", as used in 26 U.S.C. §905(a), the Eleventh Circuit has undermined the policy behind the foreign tax credit by altering the "accomodation" and "coordination" of United States taxes with foreign taxes.

Not only is the decision of the Eleventh Circuit at odds with the policy behind the foreign tax credit, but the decision of the Eleventh Circuit is also squarely in opposition to the accepted definition of the term "accrual".

Although the foreign tax credit sections of the Internal Revenue Code utilize the word "accrual", nowhere do they define that term. Rather, as the Internal Revenue Code implies, and as the Treasury Department has made clear in Rev. Rul. 61-93, 1961-1 C.B. 390, the general definition of "accrual" as used throughout the Internal Revenue Code applies to the "accrual" of foreign taxes:

> The accrual of foreign taxes, for the purpose of the foreign tax credit under section 901 of the 1954 Code . . . must conform to the general rules laid down under section 461 of the 1954 Code . . ..
>
> • • •
>
> From the foregoing, it is apparent that, for the purposes of the foreign tax credit, foreign income taxes are considered as accrued in the taxable year in which the taxpayer's liability for such foreign taxes becomes fixed and determinable. Generally such accrual occurs in the United States taxable year within which the taxpayer's foreign taxable year ends.

See also, Rev. Rul. 58-55, 1958-1 C.B. 266, at 267 ("However, the accrual of foreign taxes, for the purpose of the foreign tax credit under section 901 of the 1954 Code . . .

must conform to the general rules laid down under section 461 of the 1954 Code . . ..")

Thus, the definition of the word "accrual" for all purposes, including the foreign tax credit, is that set forth in 26 U.S.C. §461 and amplified in Treas. Reg. §1.461-1 (a)(2). Treas. Reg. §1.461-1(a)(2) states:

> Under an accrual method of accounting, an expense is deductable for the taxable year in which all the events have occurred which determine the fact of the liability and the amount thereof can be determined with reasonable accuracy.

Nowhere in the Internal Revenue Code is "accrual" defined as requiring a formal levy and assessment before "accrual" can occur. Rather, as Treas. Reg §1.461-1(a) (2) makes clear, all that is necessary for "accrual" to take place is that all of the events must have occurred which are necessary to determine the fact of liability, and that the amount of that liability be reasonably determinable. Clearly, all that this requires is that the foreign income be earned in the taxable year in question. It is at this time that the liability arises and the amount of that liability can be determined with reasonable accuracy. The foreign tax liability thus "accrues" at the close of the taxable year in which the foreign income is earned, notwithstanding the fact that no levy or assessment has been made by the foreign taxing authority.

It is apparent from the Internal Revenue Code, Treas. Reg. §1.461-1(a)(2), Rev. Rul. 61-93, 1961-1 C.B. 390, and Rev. Rul. 58-55, 1958-1 C.B. 266, that the definition of "accrual" is to be uniform in its application, notwithstanding the context in which it is applied. The foregoing view of "accrual" is consistent not only with the statute, regulations and revenue rulings, but with a long line of authority having as its precuser a case decided by this Court in 1926.

In *United States* v. *Anderson*, 269 U.S. 422, 46 S.Ct. 131 (1926), this Court established the rule that a tax "accrues" when all of the events have occurred which are necessary to determine the liability of the taxpayer for the tax, and which are necessary to determine the amount of that liability with reasonable accuracy, even though there has not been an assessment or levy. *Anderson*, 269 U.S. at 441; 46 S.Ct. at 134.

In *Anderson*, the corporate taxpayer was a manufacturer of munitions. In 1916, certain munitions' taxes were imposed by the United States for profits earned by the taxpayer during that year. These taxes were paid in 1917. The taxpayer deducted these tax payments on its return for the year 1917.

The government contended that the deduction for the 1916 taxes should have been taken in 1916, the year in which the liability "accrued". The taxpayer contended that the correct year in which to take the deduction was 1917, the year in which the 1916 tax became due and payable.

The question presented to this Court in *Anderson*, whether or not a tax liability "accrues" upon assessment or at the earlier date when all of the events necessary to fix the fact of liability have occurred, is analagous to that presented by the case under review.

In *Anderson*, this Court's answer was that there need not be a levy and/or assessment in order for a tax liability to "accrue". Rather, "accrual" of a tax liability occurs, according to this Court, in advance of assessment, when all of the events occur which are necessary to determine the taxpayer's liability and to fix the amount of that liability. *Anderson*, 269 U.S. at 441; 46 S.Ct. at 134. The answer of this Court became settled law, applied in innumerable decisions dealing with the accrual of credits, deductions, and income.

The pronouncement of this Court in *Anderson* has been so pervasive that the test set forth in that decision, which has been popularly denominated as the "all events" test, became codified in the now-existing Treasury Regulations. See Treas. Reg. §1.461-1(a)(2), *supra*.

Nonetheless, the "all events" test, as set forth in *Anderson,* as followed by its progeny, and as codified in Treas. Reg. §1.461-1(a)(2), is but a restatement of a time-honored principle of accounting. This time-honored principle, recognized by this Court in *Anderson* and applied in a legion of lower court decisions, is now threatened by the decision of the Eleventh Circuit in the case under review.

Accrual basis accounting is a method of keeping accounts which recognizes income when earned and expenses when incurred regardless of when cash is received or disbursed. Thus, under the accrual system, income is reportable when the right to receive it becomes fixed, not when the income is received. Similarly, deductions are to be taken in the year in which the liability to pay the item becomes fixed even though payment is due in a later year. *See* B. Bitker, 4 *Federal Taxation of Income, Estates and Gifts,* at ¶105.3 (1981). The decision of the Eleventh Circuit undermines the entire basis of accrual accounting by altering the definition of the word "accrual" for certain purposes. Millions of taxpayers who now rely upon the "accrual" system of accounting are certain to be affected if the decision of the Eleventh Circuit is allowed to stand.

The Fifth Circuit (the predecessor of the Eleventh Circuit) has summarized the concept of accrual accounting as follows:

> The theory behind the accrual system is not complicated. Income items are reported in the year in which the right to receive them becomes fixed even

> though such items are not immediately receivable. At no time, however, are such items reportable later than the year of actual receipt. So it is with deductions. Items to be deducted are reported in the year in which the liability to pay such items becomes fixed and the amount is reasonably ascertainable even though the payment is not then due. [citations omitted] For this reason it is recognized that an item should be accrued "when (1) all the events have occurred which fix the amount of the claim and determine the question of liability; (2) the amount is readily ascertainable; and (3) the liability therefore is determined rather than contingent". 2 Mertens, Law of Federal Income Taxation §12.76 at p. 306.

Gillis v. *United States*, 402 F.2d 501, 506 (5th Cir. 1968).

This principle has become so well-accepted that it is reflected in innumerable lower court decisions. *Gillis* v. *Commissioner, supra* (deduction "accrued" in year liability incurred where amount of liability reasonably determinable); *Schuessler* v. *Commissioner*, 230 F.2d 722 (5th Cir. 1956); *Pacific Grape Products* v. *Commissioner*, 219 F.2d 862 (9th Cir. 1955); *Harrold* v. *Commissioner*, 192 F.2d 1002 (4th Cir. 1951); *Guardian Investment Corp.* v. *Phinney*, 253 F.2d 326 (5th Cir. 1958); *Zimmerman Steel Co.* v. *Commissioner*, 130 F.2d 1011 (8th Cir. 1942); *Burlington-Rock Island Railroad Co.* v. *United States*, 321 F.2d 817 (5th Cir. 1963); *Keeby's, Inc.* v. *Paschal*, 188 F.2d 113 (5th Cir. 1951); *Putoma Corp.* v. *Commissioner*, 601 F.2d 734 (5th Cir. 1979).

Likewise, numerous judicial decisions have recognized that tax credits "accrue" in the year in which the tax liability out of which the credit arises becomes fixed and the amount thereof becomes reasonably determinable. *Anderson*, 269 U.S. at 441; 46 S.Ct. at 134; *United States* v. *Okla-*

homa Gas, 285 F.2d 333 (10th Cir. 1960); *Dravo* v. *United States*, 348 F.2d 542 (Ct. Cl. 1965); *Parrott Estate Co.* v. *McLaughlin*, 89 F.2d 188 (9th Cir. 1937); *Continental Baking Corp.* v. *Helvering*, 77 F.2d 119 (D.C. Cir. 1935); *Simon* v. *Commissioner*, 231 F.2d 639 (6th Cir. 1956); *Cecil* v. *Commissioner*, 100 F.2d 896 (4th Cir. 1939).

The same rule of "accruability" applies to the foreign tax credit as well. Rev. Rul. 61-93, 1961-1 C.B. 390; *Elmhirst* v. *Duggan*, 14 F.Supp. 782 (S.D.N.Y. 1936); *Russell-Miller Milling Co.* v. *Helvering*, 69 F.2d 392 (D.C. Cir. 1934); *Hygienic Products Co.* v. *Commissioner*, 37 B.T.A. 202, *aff'd.* 111 F.2d 331 (6th Cir. 1940); *Texas Co.* v. *Commissioner*, 9 T.C. 78 (1947). In each of these cases, the taxpayer was allowed to claim the foreign tax credit because the foreign tax had "accrued", despite the fact that the foreign government had not yet levied on the taxpayer. These holdings are consistent with the settled definition of "accrual".

Further support for the argument that Congress intended that the foreign tax credit be taken in the year to which it relates, and not in the year of levy, is found in Rev. Rul. 58-55, 1958-1 C.B. 266, and in the fact that under Section 905(a) of the Internal Revenue Code even a cash-basis taxpayer can claim the foreign tax credit in the year in which it "accrues".

In Rev. Rul. 58-55, 1958-1 C.B. at 267, the Treasury Department ruled that a "foreign tax for the purpose of such credit is accruable for the taxable year to which it relates even though the taxpayer contests the liability therefor *and such tax is not paid until a year later.*" (emphasis added). In Rev. Rul, 58-55, the Treasury Department ruled that the principle of *Dixie Pine Products Co.* v. *Commissioner*, 320 U.S. 516, 64 S.Ct. 364 (1944), that an accrual basis taxpayer could not accrue and deduct a state tax

liability that the taxpayer was contesting, had no application to the "accruability" of the foreign tax credit. See also, Rev. Rul. 77-487, 1977-2 C.B. 479, at 480. Thus, even where the taxpayer is contesting the foreign tax, the foreign tax credit is not postponed until the year in which the contested liability is finally determined, but rather, the credit applies in the year of "accrual".

Similarly, the Internal Revenue Code allows even a cash basis taxpayer to claim the foreign tax credit in the year of "accrual". ("The credits provided in this subpart may, at the option of the taxpayer and irrespective of the method of accounting employed in keeping his books, be taken in the year in which the taxes of the foreign country or the possession of the United States accrued. . . ." 26 U.S.C. §905(a)). As the Treasury Department stated in Rev. Rul. 58-55, 1958-1 C.B. 266, at 267, "[t]he alternative provisions of section 905(a) of the 1954 Code allowing a credit for foreign taxes when the tax accrued, irrespective of the accounting method used, demonstrates the special nature of such credit." Normally, a cash basis taxpayer can claim a credit only in the year in which payment takes place. 26 U.S.C. §461(a); Treas. Reg. §1.461-1(a).

The foregoing principles—that a taxpayer need not postpone its claim of the foreign tax credit, even when it is contesting the foreign tax liability, until the contested liability is finally determined, and that even a cash basis taxpayer can claim the foreign tax credit in the year of "accrual"—indicate not only the special nature of the foreign tax credit, but that it was the intent of Congress that the foreign tax credit be taken in the earliest possible year, the year of "accrual", and that the taxpayer need not await levy or assessment. Clearly, there is absolutely no basis in the Internal Revenue Code, or in the case law, for the Eleventh Circuit's decision.

United States v. *Campbell*, 351 F.2d 336 (2d Cir. 1965), relied upon by the Eleventh Circuit in its decision below, was based on law that is inapplicable today. At the time of *Campbell*, a taxpayer was required to claim the foreign tax credit promptly. See *United States* v. *Cruz*, 695 F.2d at 1153-1154 (Kravitch, J., dissenting). Because the taxpayer had failed to make prompt disclosure of its foreign income, the *Campbell* court held that the credit was not available. Today, 26 U.S.C. §6511(d)(3)(A) expressly gives a taxpayer ten years from the date of filing the return in which to claim the credit. See *Hart* v. *United States*, 585 F.2d 1025 (Ct. Cl. 1978) (en banc); See also Rev. Rul. 77-487, 1977-2 C.B. 479.

Clearly, the concern of the court in *Campbell*, and that of the Eleventh Circuit below, was the taxpayer's use of the foreign tax credit defense to avoid United States tax liability by claiming the foreign tax credit but ultimately never paying the foreign tax. See *Campbell*, 351 F.2d at 340; *Cruz*, 698 F.2d at 1152.

This argument, made by the Court in *Campbell*, and by the Eleventh Circuit below as a justification for altering the definition of "accrual", disregards the intent of the Internal Revenue Code, as well as the clear language of the Treasury Regulations, revenue rulings, and decades of precedent. Although the Eleventh Circuit characterized the taxpayer's actions as utilizing the "intricate technicalities" of the tax code as a haven for tax evasion, *Cruz*, 698 F.2d at 1151, the Internal Revenue Code permits the behavior of this taxpayer. In fact, the Internal Revenue Code contains sophisticated provisions for the contingency that the taxpayer may never pay the foreign tax which was claimed as a credit. If that tax is not paid, the government may redetermine the United States tax due from the taxpayer for the subject year under 26 U.S.C. §905(c).

When the statute of limitations of the foreign country expires, a criminal action under 26 U.S.C. §7201 is available if the taxpayer fails to amend his return accordingly. Prior to the expiration of the foreign statute of limitations, the section 7201 action is not available. If the taxpayer fails to report the foreign income and related tax credit, an action under 26 U.S.C. §7206 for willfully filing a false return may also be available.

Thus, contrary to the contentions of the Eleventh Circuit in *Cruz,* 698 F.2d at 1152, the remedies of the government are not foreclosed by utilizing the accepted definition of "accrual" as applied to the foreign tax credit. *Cruz,* 698 F.2d at 1152. Rather, the Service's traditional remedies, both criminal and civil, remain available. The only effect of these provisions is to delay a tax evasion prosecution until the foreign statute of limitations has expired. Such a result is necessary because there cannot be any evasion of United States tax, to the extent that the United States tax would be offset by an "accrued" foreign tax, until the foreign statute of limitations expires. See *Cruz,* 698 F.2d at 1154 (Kravitch, J., dissenting). This is the clear result and the clear intent of the Internal Revenue Code, because no United States taxes can be due on the foreign income as long as the foreign statute of limitations has not expired. Otherwise, the taxpayer may be subject to "double taxation".

The Treasury Regulations provide the government with additional protection from the defalcating taxpayer. Treas. Reg. §1.905-4 provides that, where a foreign tax has "accrued" but not been paid, the government may require the taxpayer to file a bond as a condition precedent to claiming the credit. In addition, Treas. Reg. §1.905-2(a) requires the taxpayer to file Form 1116 or Form 1118 when claiming the foreign tax credit. If the foreign tax return is available,

Treas. Reg. §1.905-2(a) requires the taxpayer to attach it to its United States tax return if the taxpayer is claiming the credit for an "accrued" but unpaid foreign tax. If the foreign tax return is not available, Treas. Reg. §1.905-2(b) requires the taxpayer to provide other forms of proof of the "accrual" of the foreign tax liability. And, as previously set forth herein, 26 U.S.C. §905(c) and Treas. Reg. §1.905-3 provide for a redetermination of the taxpayer's United States tax liability when the amount of the foreign tax credit claimed proves incorrect.

These administrative provisions, as well as the civil and criminal remedies alluded to, provide the government with adequate safeguards and remedies to prevent the abuse of the foreign tax credit. Given the foregoing, there is no justification for altering the settled definition of the word "accrual" in the name of the assertion of criminal liability.

In its decision below, the Eleventh Circuit has altered the accepted definition of the term "accrual" by grafting on to that definition the additional requirment of a levy. In the Eleventh Circuit, a taxpayer cannot now claim the foreign tax credit until the year in which the foreign government levies the tax on the taxpayer, notwithstanding the fact that, under the settled definition of the word "accrual", the foreign tax liability became fixed in the year that the income was earned.

Beside the fact that the *Cruz* decision undermines the policy behind the foreign tax credit and has no basis in the law, the *Cruz* decision raises other serious issues of great administrative and practical importance.

As previously stated herein, Treas. Reg. §1.461-1(a)(2) sets forth a single, uniform meaning for the term "accrual". In *Cruz*, the Eleventh Circuit has apparently changed the definition of this term as used in the context of the foreign tax credit when raised in a tax evasion

prosecution. Whether or not the Eleventh Circuit's new definition of "accrual" applies in other contexts is not clear from the *Cruz* decision. Nevertheless, it is arguable that the danger exists that the specious reasoning of *Cruz* could be utilized to alter the entire concept of "accrual" accounting as used in the Internal Revenue Code and to render meaningless the provisions of Section 905(c) of the Code which provides for a redetermination of the taxpayer's United States tax liability when the amount of the foreign tax credit claimed proves incorrect. Even if the foregoing is not the case, it is unthinkable that the term "accrual" can have one meaning in the context of the foreign tax credit in a tax evasion prosecution, and a different meaning in all other contexts. Such a result contravenes the clear intent of the Internal Revenue Code, the Treasury Regulations, and the case law construing the Code.

If the application of the Eleventh Circuit's new definition is limited to criminal cases where the foreign tax credit is raised, the results will be anomalous. Theoretically, a taxpayer could be criminally liable yet not be civilly liable for the same transaction. This is so because the Eleventh Circuit's new definition of "accrual" would, in effect, provide an easier standard of proof for the government in a criminal action than in a civil action. Such a concept is contrary to our jurisprudential tradition.

This result is anomalous for an additional reason. Under settled law, a taxpayer cannot be guilty of a criminal tax violation if there is no underlying civil tax violation. *Koontz* v. *United States,* 277 F.2d 53 (5th Cir. 1960); *Willingham* v. *United States,* 289 F.2d 283 (5th Cir. 1961), *cert. denied,* 368 U.S. 828 (1961). And, under the Eleventh Circuit's definition of the word "accrual," as used in the

context of the foreign tax credit, a tax deficiency can be found for criminal purposes even though there is no underlying civil tax deficiency. This is so because under the Eleventh Circuit's decision, the "accrual" of foreign taxes for criminal purposes requires a levy, whereas for civil purposes there is no such requirement.

The rules of accrual accounting and the definition of the term "accrual" are, and must be, uniform. The Eleventh Circuit itself acknowledged that the foreign tax credit is governed by the same rules of "accrual" that govern any other tax credit. *United States* v. *Cruz*, 698 F.2d at 1151 ("The accrual of the foreign tax credit is essentially governed by this rule." [referring to the "all events" test]); See also, Rev. Rul. 61-93, 1961-1 C.B. 390, 391. Unfortunately, the Eleventh Circuit proceeded to create and apply a novel and incorrect rule. *Cruz*, 698 F.2d at 1151.

Notwithstanding the view of the Eleventh Circuit, it is clear that the word "accrual" has, and was intended to have, a uniform meaning throughout the tax law, whether the context be one of a domestic tax credit or a foreign tax credit, a deduction, the computation of income, or whether the action is civil or criminal. See Treas. Reg. 1.461-1(a)(2); Rev. Rul. 61-93 1961-1 C.B. 390.

The decision of the Eleventh Circuit below has altered the settled definition of the word "accrual". This new definition contravenes the implied meaning of 26 U.S.C. §461, the express language of Treas. Reg. §1.461-1(a)(2), as well as the judicial definition of the term "accrual" as set forth by this Court and followed in innumerable cases. The decision of the Eleventh Circuit undermines the policy behind the foreign tax credit and subverts the intended effect of that credit, the prevention of in-

ternational double taxation. By altering the settled definition of the word "accrual", the Eleventh Circuit's action threatens the very core of a system of tax accounting which is relied upon by millions of taxpayers. In addition, the Eleventh Circuit's decision threatens the uniformity necessary for the effectuation and application of the tax laws in a just manner. Finally, the Eleventh Circuit's decision has the anomalous result of holding this taxpayer criminally liable for an action as to which no civil liability attaches. This result necessarily flows from the Eleventh Circuit's decision below which imposes criminal sanctions in a situation where there may be no underlying civil tax deficiency.

CONCLUSION

The decision of the court below conflicts with the clear intent of a federal statute, the clear language of a federal regulation, as well as with decisions of this Court, federal circuit courts, and innumerable lower federal courts. The issue presented is one of great legal and practical importance in the administration of our tax law and should be decided by this Court.

For the above-stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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